ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
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December 20, 1999

BY FACSIMILE
The Honorable Carol M. Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Dear Administrator Browner:

I appreciate the Environmental Protection Agency's (EPA's) response of July 26, 1999 to my July 1st letter regarding an EPA-developed computer registry for tracking greenhouse gas emissions trading under the Kyoto Protocol and EPA's activities with respect to Argentina's emission reduction commitments. I have questions about some of EPA's responses, as does House Science Committee Chairman James Sensenbrenner, who asks that I write to you given my Subcommittee's jurisdiction over rulemaking and the Congressional Review Act. Therefore, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that you respond to the questions enumerated in the enclosure, consulting with the State Department as necessary to ensure the completeness of your responses.

Please provide the information requested in this letter by January 21, 2000 to the House Subcommittee majority and minority staffs in Rayburn House Office Building rooms B-377 and B-350A, respectively. Please also, as a courtesy to Mr. Sensenbrenner, send a copy of your response to the Science Committee majority staff in H2-389. If you have any questions about this request, please contact Staff Director Marlo Lewis at 225-1962.

Sincerely,

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich
The Honorable F. James Sensenbrenner
The Honorable Jerry F. Costello

Enclosure

Q1. The Environmental Protection Agency's (EPA's) July 26, 1999 letter notes that "some of the records are deliberative in nature or contain materials subject to the attorney-client and attorney work privileges, and are so marked." My review of them shows only three documents are stamped "Privileged" (i.e., Attachments M, N and O). I, therefore, presume that all others are not subject to your note and, consequently, I intend to make them publicly available.

As to the three documents in question, I have serious doubts that any of them should be classified as "deliberative in nature" or "material subject to the attorney-client and attorney work privilege." Documents N and O relate to the establishment of an Argentine emissions target; document M, to the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999. That Act is "history" and therefore not deliberative in nature. Argentina, presumably, is not a client of the EPA.

Although the Freedom of Information Act provides for exemptions (e.g., materials classified as secret in the interest of national defense or foreign policy pursuant to an Executive Order, trade secrets, and information compiled for law enforcement purposes), routinely exempting documents from disclosure would defeat the purpose of the Act. I suspect that your staff has overused the term "Privileged."

a. Therefore, please provide specific reasons why any of these documents deserves the "Privileged" status and should not be made public.

b. Also, Attachment Y includes in the opening paragraph a reference to three documents that apparently were not included in the materials EPA provided. Please provide them to me.

Q2. In response to Question 2, EPA affirmed that its development of an emissions trading registry was within the "bounds" of the Knollenberg funding limitation. Specifically, EPA argued that the Knollenberg restriction only "bars expenditures to propose or issue 'rules, regulations, decrees, or orders' for the purpose of implementation or in preparation for implementation of the Kyoto Protocol" and does not limit EPA participation in "international negotiations" concerning the Kyoto "flexible mechanisms." EPA's response concluded: "Development of the model registry is part of those negotiations and does not involve any rule making activity and does not impose any burdens or mandates on the United States or on any private sector entities. For these reasons, we do not believe this effort poses any issue under the appropriations restriction." I question EPA's legal authority, under the Knollenberg limitation, to participate in such negotiations. The negotiations are preparatory to proposed or interim rulemakings, which would be issued should the U.S. Senate ratify the Kyoto Protocol. I also question the claim that any decisions reached through the negotiations will not "impose any burdens or mandates" on the United States.

a. As I understand the current status of the "international negotiations" regarding the Kyoto mechanisms of Articles 6, 12 and 17, and other Articles of the Kyoto

Protocol, the decisions at Buenos Aires call upon the Parties to the Framework Convention on Climate Change (FCCC) to "prepare for the future entry into force of the Kyoto Protocol" (see particularly Decision 1/CP.4). That decision, among other things, requires negotiations for development of relevant "principles, modalities, rules and guidelines" under Article 17, with a "view" of the Parties "taking a decision" on that mechanism and all others at the 6th Session of the Conference of the Parties (COP), which may be scheduled in late 2000 or early 2001. Are not the intended results of those negotiations "rules" of general applicability and future effect? Thus, are not those negotiations rule makings "in preparation for implementation" of the Kyoto Protocol?

b. In response to Science Committee Chairman F. James Sensenbrenner, Jr., the State Department, in a May 4, 1999 letter said: "A2.1. Both of the articles in the Protocol cited in your question [i.e., Article 6 and 12] indicate that the Parties intended that the details would be worked out by the COP/MOP. Thus, paragraph 2 of Article 6 provides that the COP/MOP shall 'elaborate guidelines.' Similarly, paragraph 7 of Article 12 provides that the COP/MOP shall 'elaborate modalities and procedures.' The absence of the word 'rules' does not mean that the COP/MOP lacks the power to develop rules, procedures and the like to which parties would need to adhere." The same letter also said: "A2.3. In the case where authority has been granted to the COP or COP/MOP to decide on the manner in which a particular mechanism is to operate, it will be up to the language of the decision itself whether its contents (or part of its contents) are to be legally binding or advisory. For example, under Article 17, the COP could decide that certain aspects of the emissions trading regime should be mandatory and that others should simply be recommendatory." Again, are not the intended results of EPA's negotiation rules of general applicability and future effect in preparation for implementation of the Kyoto Protocol?

c. It is my understanding from reading correspondence between the State Department and Chairman Sensenbrenner that COP/MOP "rules, procedures and the like" will be binding on the United States. If that is true, what is the basis for the EPA statement that "international negotiations surrounding development" of the Kyoto mechanisms "does not involve any rule making activity"? What is your definition of a "rule" in this context? Isn't it a binding requirement for all Protocol Parties? Again, are not these negotiations rule makings in preparation for implementing the Kyoto Protocol?

Q3. In response to Question 4, EPA states that the Emissions Marketing Association (EMA) and the Environmental Defense Fund (EDF) "are working together on a project called the Emissions Trading Education Interactive" and that EPA has provided a grant of $175,000 to EMA. Also, the letter explains that EPA has "active grants or contracts with EDF and with a few of EMA's associated organizations ... on matters related to the prototype."

a. Was the $175,000 grant competitively awarded? If not, why not? If so, what other organizations applied for this grant? What were their bids? Please provide me with copies of their applications.

b. Please provide the details and status of the Emissions Trading Education Interactive project and the grant, including a copy of all letters, notes, memoranda, reports, contracts and other materials in EPA files regarding each, and the identity, purpose, and amount of such grants and contracts with EDF and the EMA organizations.

c. If EMA and EDF are "working together," are both recipients of this grant? If not, what do you mean by the words "working together?"

d. Please also provide more details about the development, with the above grant, of "public information and industry education materials" and explain how they will be used. Who will use these materials? What is EPA's role in regard to their content, production, or dissemination? What are the grant conditions?

Q4. The reply to Question 5 reports that EPA has made grants to Argentina of $750,000. Attachment II from the Grants Administration Division shows that the Project Title is: "Working Plan for the adoption of Argentine GHGS Emission Targets – To produce the necessary technical information to enable the country of Argentina to assume goals for greenhouse gas emissions (GSG) for the 2008-2012 period." The reference to "goals" is puzzling, because I was under the impression from statements by former Under Secretary Stuart Eizenstat that Argentina was going to adopt a "legally binding target." Indeed, in a May 4, 1999 reply to Chairman Sensenbrenner, the State Department reiterated that such a pledge was made. However, the Department added that Argentina "does not intend to join Annex I" of the FCCC "or Annex B" of the Protocol, which, of course, raises the question of how Argentina plans to carry out the pledge.

It appears from Attachment II, Attachment JJ, which includes a "Working Plan for the Adoption of Argentine GHGs Emission Targets," and Attachment P that Argentina was to announce a target or goals for 2008-2012 using 1997 as the baseline year "due to the economic depression suffered in Argentina in 1990," as Argentine officials "feel that by 1997 the economy has more or less recovered from the 1990 crisis."

In fact, Argentina's so-called "commitment" announced at Bonn in November at COP-5 in reality is only a voluntary, non-binding plan of greenhouse gas reduction. This being the case, please explain why the U.S., through the EPA, made grants to Argentina of $750,000 for a goal or target that will be not legally binding. Is this to be a precedent for other developing countries? If so, how is it consistent with the Byrd-Hagel Resolution, S. Res. 98?

Q5. Since the December 1997 meeting in Kyoto, has EPA made, or does it plan to make, grants to other developing countries? If yes, please provide the details of each grant and its associated funding and terms.